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No. 04-1329

Supreme Court, U.S.
FILED
AUG 4 - 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ILLINOIS TOOL WORKS INC. *et al.*,
Petitioners,

v.

INDEPENDENT INK, INC.
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF *AMICUS CURIAE* INTELLECTUAL PROPERTY OWNERS ASSOCIATION IN SUPPORT OF THE PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THERE SHOULD BE NO PRESUMPTION THAT A PATENT DEFINES AND CONFERS MARKET POWER IN A RELEVANT MARKET ON A TYING PRODUCT UNDER SECTION 1 OF THE SHERMAN ACT	4
A. The Burden Of Proving Market Power Should Remain On The Antitrust Plaintiff In A Patent Tying Case Without The Benefit Of A Market Power Presumption	5
B. There Is No Rational Economic Basis For A Presumption Of Market Power Because Patents Do Not Inherently Define A Relevant Market	11
C. The Market Power Presumption Deters Conduct By Patent Owners That Benefits Consumers	13
D. The Market Power Presumption Facilitates The Assertion Of Baseless Antitrust Counterclaims By Infringers	14

TABLE OF CONTENTS—Continued

	Page
E. The Department Of Justice And Federal Trade Commission Do Not Apply A Presumption Of Market Power When Evaluating A Tying Case Involving A Patent On The Tying Product	14
CONCLUSION	17
APPENDIX	1a

TABLE OF AUTHORITIES

Cases:	Page
A.I. Root Co. v. Computer/Dynamics, Inc., 806 F.2d 673 (6th Cir. 1986)	13
Am. Hoist & Derrick Co. v. Sowa & Sons., Inc., 725 F.2d 1350 (Fed. Cir. 1984)	6
Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572 (Fed. Cir. 1990)	6
Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971)	5
Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989)	8
Brenner v. Manson, 383 U.S. 519 (1966)	8
Chiuminatta Concrete Concepts, Inc. v. Target Prods., Inc., No. CV 92-1523 LGB (SX), 1992 WL 465720 (C.D. Cal. Dec. 2, 1992), *aff'd*, 19 F.3d 41 (Fed. Cir. 1994)	6
Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992)	4
Eldred v. Ashcroft, 537 U.S. 186 (2003)	7
F.B. Leopold Co. v. Roberts Filter Mfg. Co., 882 F. Supp. 433 (W.D. Pa. 1995), *aff'd*, 119 F.3d 15 (Fed. Cir. 1997)	6
Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd., 535 U.S. 722 (2002)	8
Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 339 U.S. 605 (1950)	8
In re Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322 (Fed. Cir. 2000)	6
Indep. Ink, Inc. v. Ill. Tool Works, Inc., 396 F.3d 1342 (Fed. Cir.), *petition for cert. filed*, 73 U.S.L.W. 3604 (U.S. Apr. 4, 2005) (No. 04-1329)	2, 3, 4
International Salt Co. v. United States, 332 U.S. 392 (1947)	3, 4, 5, 16, 17

TABLE OF AUTHORITIES—Continued

	Page
J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124 (2001)	8
Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984)	9, 11, 12, 13, 15
Jungersen v. Ostby & Barton Co., 335 U.S. 560 (1949)	16
Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974)	8
Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996)	6, 7
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	14
Mazer v. Stein, 347 U.S. 201 (1953) (1986)	5
Motion Picture Patents Co. v. Universal Films Mfg. Co., 243 U.S. 502 (1917)	12
N. Pac. Ry. Co. v. United States, 356 U.S. 1 (1958)	9
Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806 (1945)	5
Schlafly v. Pub. Key Partners, No. 94-20512 SW, 1997 WL 564073 (N.D. Cal. Aug. 29, 1997), *aff'd*, 155 F.3d 565 (Table), 1998 WL 205766 (Fed. Cir. 1998)	6
Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964)	7
State Oil Co. v. Khan, 522 U.S. 3 (1997)	3
The Case of Monopolies (*Darcy v. Allein*), 77 Eng. Rep. 1260 (K.B. 1602)	7
USM Corp. v. SPS Techs., Inc., 694 F.2d 505 (7th Cir. 1982)	6, 13
United States Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610 (1977)	9, 12
United States v. Loew's Inc., 371 U.S. 38 (1962)	3, 4, 5, 13

TABLE OF AUTHORITIES—Continued

	Page
United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948)	5
Va. Panel Corp. v. MAC Panel Co., 133 F.3d 860 (Fed. Cir. 1997)	6
Will v. Comprehensive Accounting Corp., 776 F.2d 665 (7th Cir.1985)	6, 14
Statutes:	
15 U.S.C. § 1	*passim*
35 U.S.C. §§ 101-103	8
35 U.S.C. § 112	8
Other Authorities:	
Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶ 1134b (1980)	12
Phillip E. Areeda, Einer Elhauge & Herbert Hovenkamp, *Antitrust Law* § 1737c (2d ed. 2004)	12
Yannis Bakos & Erik Brynjolfsson, *Bundling and Competition On The Internet* Marketing Science (Jan. 2000)	13
Yannis Bakos & Erik Brynjolfsson, *Bundling Information Goods: Pricing, Profits and Efficiency*, Management Science (Dec.1999) ("*Bundling Information Goods*")	13
Robert H. Bork, *The Antitrust Paradox* (1978)	12
Makan Delrahim, Deputy Assistant Attorney General, *Contemporary Issues At The Intersection of Intellectual Property And Antitrust*, Remarks made before the Fair Competition & Market Economy 2004 Shanghai International Forum, Shanghai, China, Nov. 10, 2004 *available at* http://www.doj.gov/atr/public/speeches/206607.pdf	16

TABLE OF AUTHORITIES—Continued

	Page
Robin C. Feldman, *The Insufficiency of Antitrust Analysis for Patent Misuse*, 55 Hastings L.J. 399 (2003)	7
Herbert Hovenkamp, *Federal Antitrust Policy* § 10.3 (2d ed. 1999)	12
William Montgomery, *The Presumption of Economic Power for Patented and Copyrighted Products in Tying Arrangements*, 85 Colum. L. Rev. 1140 (1985)	8
R. Hewitt Pate, Acting Assistant Attorney General, *Antitrust And Intellectual Property*, Address before the American Intellectual Property Law Association, Jan. 24, 2003, *available at* http,//www.doj.gov/atr/public/speeches/200701.pdf	15
Richard A. Posner, *Antitrust Law* (2d ed. 2001)	12
H. Schwartz, *Patent Law and Practice* (2d ed. 1995)	7
Fed. Trade Comm'n, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (2003)	15
U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property § 5.3 (1995)	15, 16

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BRIEF *AMICUS CURIAE* INTELLECTUAL PROPERTY OWNERS ASSOCIATION IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Amicus Intellectual Property Owners Association (IPO) is a non-profit, national organization founded in 1972 to represent the owners of intellectual property in the United States. IPO's members currently include 120 large and mid-sized companies and over 250 small businesses, law firms, inven-

[1] The parties have consented to the filing of this brief *amicus curiae*. In accordance with Supreme Court Rule 37.2(a), the letters of consent are attached hereto. Pursuant to this Court's Rule 37.6, *amicus* represents that this brief was not authored in whole or in part by counsel for any party. Petitioners, both IPO members, made no monetary contribution to the preparation or submission of this brief beyond normal membership dues payments. No other person or entity made a monetary contribution other than IPO, its members, or its counsel.

tors, authors, executives, and attorneys who own or are interested in patents and other forms of intellectual property in any industry or field of technology. IPO members are granted about 30 percent of the patents issued by the U.S. Patent and Trademark Office to U.S. nationals. IPO regularly represents the interests of its members before Congress and the U.S. Patent and Trademark Office, and has filed *amicus curiae* briefs in this Court and other courts on significant issues of intellectual property law.

IPO expressly declines to take any position on whether there is a factual basis for finding Petitioners' claims to be invalid or unenforceable. IPO is concerned with the interests of all of its members in all industries and all fields of technology. IPO believes that while the Federal Circuit strictly applied decades-old Supreme Court precedent, the market power presumption unfairly handicaps patent holders and is in tension with modern economic theory. The Federal Circuit's *Independent Ink* opinion, if not vacated or modified by the Court, will adversely affect legitimate business and creative uses of patent rights of a large number of IPO members.

In this brief, IPO explains how the Federal Circuit's *Independent Ink* decision could affect the outcome of this and future cases. IPO believes its brief will be helpful to the Court in considering Petitioners' brief on the merits. The filing of this brief was approved by at least a three-fourths majority of the IPO Board of Directors, the members of which are listed in the accompanying Appendix.

INTRODUCTION

The United States Court of Appeals for the Federal Circuit reversed the summary judgment that had been granted in favor of Petitioners, Illinois Tools Works, Inc. ("ITW"), and Trident, Inc. ("Trident"), under a Sherman Act Section 1

(15 U.S.C. § 1) theory brought in a tying case in the district court involving Trident and ITW's U.S. Patent No. 5,343,226 ("the '226 patent"). The Federal Circuit panel relied on the holdings in *International Salt Co. v. United States*, 332 U.S. 392 (1947) and *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), and held that patent and copyright tying, unlike other tying cases, does not require plaintiffs to show market power in the tying product. Instead, "*International Salt* and *Loew's* make clear that the necessary market power to establish a section 1 violation is presumed."[2] The Federal Circuit rejected ITW and Trident's claim that *International Salt* and *Loew's* were no longer good law. The Federal Circuit concluded that, despite the perceived inadequacies of the two cases, it still "remains the '[Supreme] Court's prerogative alone to overrule one of its precedents.'" *Indep. Ink, Inc., v. Ill. Tool Works, Inc.*, 396 F.3d 1342, 1351 (Fed. Cir.), *petition for cert. filed*, 73 U.S.L.W. 3604 (U.S. Apr. 4, 2005) (No. 04-1329) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)).

Our members firmly believe that the more than a half-century-old decisions of *International Salt* and *Loew's* should at long last be overruled.

SUMMARY OF ARGUMENT

The burden of proving market power should be placed and remain on the antitrust plaintiff in a patent tying case, as it is in all other tying cases. There should be no presumption that because the tying product is patented, it somehow inherently defines the relevant market and mandates a finding of market power.

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[2] *Indep. Ink, Inc. v. Ill. Tool Works, Inc.*, 396 F.3d 1342, 1348-49 (Fed. Cir.), *petition for cert. filed*, 73 U.S.L.W. 3604 (U.S. Apr. 4, 2005) (No. 04-1329).

There are compelling reasons for now reconsidering the market power presumption in tying cases involving a patent. Such presumption is squarely at odds with the Court's contemporary approach as to how an antitrust plaintiff must prove market power in *non*-patent tying cases. The Federal Trade Commission and the Department of Justice, two federal antitrust enforcement agencies principally responsible for enforcing the nation's antitrust laws, have repeatedly rejected the application of the presumption of market power theory in patent tying cases. Several circuit courts and notable antitrust commentators have brought the presumption into question as an unfair burden imposed upon patent and copyright owners that does not extend to other types of antitrust defendants involved in a tying case. The *Independent Ink* case clearly presents the opportunity for the Court to harmonize patent tying cases with modern economic theory. The Court should overturn the precedent of *International Salt* and *Loew's* and resolve this important question of antitrust law.

ARGUMENT

I. THERE SHOULD BE NO PRESUMPTION THAT A PATENT DEFINES AND CONFERS MARKET POWER IN A RELEVANT MARKET ON A TYING PRODUCT UNDER SECTION 1 OF THE SHERMAN ACT

The Federal Circuit stated that it was compelled to follow this Court's precedent that a rebuttable presumption of market power arises from the mere possession of a patent on the tying product sufficient to establish a *prima facie* Sherman Act Section 1 claim.[3] This Court established such precedent

[3] Tying arrangements violate Section 1 of the Sherman Act "if the seller has 'appreciable economic power' in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market.'" *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 462 (1992) (citation omitted).

more than fifty years ago in *International Salt Co. v. United States*, 332 U.S. 392 (1947) and *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), and reaffirmed in *United States v. Loew's Inc.*, 371 U.S. 38 (1962), holding that a presumption of market power exists in a tying case when the tying product is patented or copyrighted. That precedent should be overturned, as it is contrary to modern economic theory involving tying. Instead, just as in any other tying case, the burden of proof should rest squarely on the shoulders of the antitrust plaintiff to establish market power in the patented tying product.

A. The Burden Of Proving Market Power Should Remain On The Antitrust Plaintiff In A Patent Tying Case Without The Benefit Of A Market Power Presumption

Meeting the standards for patentability does not equate with meeting the definition of economic power necessary to support anticompetitive behavior in a relevant market. This Court recognized long ago that there is nothing inherently anticompetitive about patent ownership. *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"). Moreover, this Court has observed that "'A patent by its very nature is affected with a public interest. . . . (It) is an exception to the general rule against monopolies and to the right to access to a free and open market. '" *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 343 (1971) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 816 (1945)). Many lower courts, when faced with a tying case, have

concluded that a patent on the tying product does not alone confer market power.[4]

Patent rights are derived from the Constitution,[5] and as interpreted by Congress, a patent grants inventors "'the right

[4] *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1325-26 (Fed. Cir. 2000) ("A patent alone does not demonstrate market power."); *Va. Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 872 (Fed. Cir. 1997) ("Violation of the antitrust laws always requires . . . market power in a defined relevant market (which may be broader than that defined by the patent . . . ."); *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990) ("[T]he aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition." (Citation omitted.)); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 n.4 (7th Cir. 1985) (Easterbrook, J.); *Am. Hoist & Derrick Co. v. Sowa & Sons., Inc.*, 725 F.2d 1350, 1367 (Fed. Cir. 1984) ("patent rights are not *legal monoplies* in the antitrust sense of that word"); *USM Corp. v. SPS Techs., Inc.*, 694 F.2d 505, 511 (7th Cir. 1982) (Posner, J.) ("[O]f course, not every patent confers market power . . . ."); *Schlafly v. Pub. Key Partners*, No. 94-20512 SW, 1997 WL 564073, at *4 (N.D. Cal. Aug. 29, 1997) ("A patent does not of itself establish a presumption of market power in the antitrust sense.") (citations and internal quotation marks omitted), *aff'd*, 155 F.3d 565 (Table), 1998 WL 205766, at *7 (Fed. Cir. 1998) ("Mere possession of a patent, or a family of patents, does not establish a presumption of antitrust market power."); *F.B. Leopold Co., v. Roberts Filter Mfg. Co.*, 882 F. Supp. 433, 454 (W.D. Pa. 1995) (patent on porous plate, the tying product, insufficient to establish market power), *aff'd*, 119 F.3d 15 (Fed. Cir. 1997); *Chiuminatta Concrete Concepts, Inc. v. Target Prods., Inc.*, No. CV 92-1523 LGB (SX), 1992 WL 465720, at *4 (C.D. Cal. Dec. 2, 1992) (patent on certain skid plates, the tying products, insufficient to establish market power in tying claim), *aff'd*, 19 F.3d 41 (Fed. Cir. 1994).

[5] "The [U.S.] Constitution empowers Congress '[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.' [U.S. Const.] art. I, § 8, cl. 8. Congress first exercised this authority in 1790, when it provided for the issuance of 'letters patent,' Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109." *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 373 (1996).

to exclude others from making, using, offering for sale, selling, or importing the patented invention,' in exchange for full disclosure of an invention." *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996) (quoting H. Schwartz, *Patent Law and Practice* 1, 33 (2d ed. 1995)). The grant of a U.S. patent conveys a unique form of property, with the rights to exclude others from using the invention if certain criteria are met, as "'patents are not given as favors . . . but are meant to encourage invention by rewarding the inventor with the right, limited to a term of years fixed by the patent, to exclude others from the use of his invention.'" *Eldred v. Ashcroft*, 537 U.S. 186, 215-16 (2003) (quoting *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964)). In essence, a patent is merely a time-limited opportunity to attempt to capture a return on an investment of time and capital. Owning a patent does not guarantee that the patentee will ever earn anything from the bundle of rights granted by Act of Congress. The gamble that the inventor invariably is compelled to take once she submits an application to the Patent Office is that the industry may not be mature enough to appreciate the commercial aspects of the invention during the patent's enforceable period. Indeed, there is no guarantee that a patentee will ever be able to practice his or her invention as other patents owned by competitors on an underlying invention frequently act as a legal roadblock. The marketplace's inability to recognize or calculate the value of an invention is one of the hazards of a limited patent term. *See* Robin C. Feldman, *The Insufficiency of Antitrust Analysis for Patent Misuse*, 55 Hastings L.J. 399, 445 (2003).

The grant of a patent has been construed by some to be akin to a statutory monopoly, just as the granting of patents in England was an explicit exception to the statute of James I prohibiting monopolies. *See Sears*, 376 U.S. at 229-30 (citing *The Case of Monopolies* (*Darcy v. Allein*), 77 Eng. Rep. 1260 (K.B. 1602)). But the standards for patentability

should not somehow be misconstrued to equate with the standards of economic power necessary to support a determination of anticompetitive behavior for antitrust purposes in a relevant market.[6] At a minimum, before a patent is granted, the claimed subject matter only "must be useful, novel, and not obvious." *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 736 (2002) (citing 35 U.S.C. §§ 101-103 (1994 & Supp. V)). Moreover, "the patent application must describe, enable, and set forth the best mode of carrying out the invention." *Id.* (citing 35 U.S.C. § 112 (1994)). It is only these substantive threshold requirements that have to be satisfied before issuance of a patent can occur, for exclusive patent rights are granted in exchange for disclosing the invention to the public. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989) ("The Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the 'Progress of Science and useful Arts.'"); *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 142 (2001) ("The disclosure required by the Patent Act is 'the *quid pro quo* of the right to exclude.'" (quoting *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 484 (1974)); *Brenner v. Manson*, 383 U.S. 519, 534 (1966) ("The basic *quid pro quo* . . . for granting a patent monopoly is the benefit derived by the public from an invention with substantial utility."); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 607 (1950) (the disclosure of inventions, "is one of the primary purposes of the patent system").

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[6] William Montgomery, *The Presumption of Economic Power for Patented and Copyrighted Products in Tying Arrangements*, Note, 85 Colum. L. Rev. 1140, 1149 (1985) ("[T]he existence of a patent or copyright provides little, if any, evidence of supernormal profits, barriers to entry, consumer preferences, or absence of adequate substitutes. It thus does not dispose of the question whether a product has market power.").

The Court's precedent should be overturned so that the law will be clear that a patent, without more, is merely a grant of a property right to exclude others for limited times from making, using, selling, offering to sell, or importing into the United States the invention claimed in the patent. A patent cannot serve to define a market, much less provide actual evidence of market power. The Court should act to harmonize the law for matters involving patent tying cases with those of non-patent tying cases, which are only unlawful if the antitrust defendant has demonstrable market power in the relevant market for the tying product. *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 620 (1977) ("*Fortner II*").[7] In tying cases not involving intellectual property, this Court has consistently held that there must be proof of "forcing" or market power resulting in an "actual adverse effect on competition" in the relevant market by the tying arrangement and also has recognized that patents and copyrights are not synonymous with "market power." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29-31, 37 n.7 (1984).[8]

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[7] Determining market power requires making an inquiry into "whether the seller has the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market." *Fortner II*, 429 U.S. at 620. The requirement of demonstrating sufficient market power to raise prices was notably more onerous than the *Northern Pacific* requirement that there be some power to "appreciably restrain free competition." *Fortner II*, 429 U.S. at 620 (citing *N. Pac. R. Co. v. United States*, 356 U.S. 1 (1958)).

[8] In *Jefferson Parish*, 466 U.S. at 37 n.7, Justice O'Connor wrote in concurrence:

> A common misconception has been that a patent or copyright, a high market share, or a unique product that competitors are not able to offer suffices to demonstrate market power. While each of these three factors might help to give market power to a seller, it is also possible that a seller in these situations will have no market power:

The need to eliminate the presumption of market power can readily be shown by way of example. For instance, if an owner of an entire multi-unit condominium complex in a typical city required each buyer to dine in a mezzanine level restaurant in that building three times per week as a condition of purchasing a condominium unit, there should be no presumption that the multi-unit complex owner somehow has market power in the relevant tying condo market in that city sufficient to "force" buyers to purchase their meals in the mezzanine restaurant, i.e., the tied product. These potential buyers can purchase a condominium unit from a different owner and dine elsewhere as they see fit. Market power would have to be proven by the antitrust plaintiff, not presumed, as no intellectual property is involved, and it is unlikely to exist in a city where much cross-elasticity of demand exists due to the existence of many other condominium complexes competing for a share of the potential buyer market.

The argument is no different if the property at issue is intellectual and not tangible. The same principle should be applied to patent tying cases, where market power should not be presumed in the patented tying product just because a patent application met the minimum standards for novelty, usefulness, and non-obviousness. These patentability criteria have no necessary relationships to the economic factors that define markets and establish the existence of market power.

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for example, a patent holder has no market power in any relevant sense if there are close substitutes for the patented product.

B. There Is No Rational Economic Basis For A Presumption Of Market Power Because Patents Do Not Inherently Define A Relevant Market

As numerous commentators have long recognized, the mere ownership of a patent does not confer market power to the patent owner sufficient to satisfy the stringent requirements of a Sherman Act Section 1 tying case. The premises underlying the presumption are invalid. Before one can have market power, one must first define the market. Patent claims define an invention, not a market. The presumption is tenuously based on the basic right of a patent owner to exclude others from practicing his or her invention without permission. If one assumes that patent claims define a market, then this right to exclude does not confer market power on the patent owner for the simple reason that there may be, and often are, close non-infringing substitutes for the patented invention. Thus, the existence of non-infringing substitutes precludes the owner from exercising market power.

Indeed, the majority of patents lack any real semblance of commercial value; to the extent that patents have inherent value, they invariably face robust competition in the marketplace. For example, a company that has a 1% share of the personal computer market hardly has market power in that market merely because the company owns a patent that relates to one component of the computer. However, it is economically rational for the company to only sell the component inside of its own brand of computers. The recognition that a patent, without more, does not confer market power was recognized by Justice O'Connor in her concurring opinion in *Jefferson Parish* that "a patent holder has no market power in any relevant sense if there are close substitutes for the patented product." *Jefferson Parish* , 466 U.S. at 37 n.7.

Prominent antitrust scholars have also long expressed serious doubts about the alleged anticompetitive effects of tying. Phillip E. Areeda, Einer Elhauge & Herbert Hovenkamp, *Antitrust Law* ¶ 1737c, at 82 (2d ed. 2004) ("If *Salt* really required power and inferred it from any patent, it erred. By contrast, if *Salt* was essentially indifferent to power over the tying product, it has been overruled by the legal rule adopted in *Fortner II* [*United States Steel Corp. v. Fortner Enters.*, 429 U.S. 610 (1977)] and *Jefferson Parish*."); Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶ 1134b, at 205 (1980) (tying may simply be used as an efficient method of effecting lawful price discrimination, as a means of preserving consumer confidence in the performance of a complex product, or, in the case of servicing tied to distribution of a complex product, an efficient mode of generating information leading to product improvement."); Robert H. Bork, *The Antitrust Paradox* 365, 372-75 (1978) ("The Supreme Court has seen in this tying together of transactions nothing but the suppression of competition. . . . [I]t is safe to say that suppression of competition is the one function not accomplished by the arrangements the Court has struck down."); Richard A. Posner, *Antitrust Law* 197-207 (2d ed. 2001) ("[t]he frequency with which patents have been involved in tying cases may stem from the fact that the earliest such cases were not antitrust cases at all. They were patent-misuse cases, where the issue was whether the patentee had improperly extended the patent monopoly by monopolizing an unpatented product tied to the patented product.") (citing *Motion Picture Patents Co. v. Universal Films Mfg. Co.*, 243 U.S. 502 (1917)); Herbert Hovenkamp, *Federal Antitrust Policy* § 10.3 (2d ed. 1999) ("Most patents confer absolutely no market power on their owners. . . . [The] economic case for 'presuming' sufficient market power . . . simply because the tying product is patented . . . is very weak.")

C. The Market Power Presumption Deters Conduct By Patent Owners That Benefits Consumers

Historically, it has long been considered to be unprofitable and inefficient to bundle together large numbers of unrelated goods. However, some recent scholars have posited that tying actually increases the availability of goods, especially with respect to digital information goods. Yannis Bakos & Erik Brynjolfsson, *Bundling Information Goods: Pricing, Profits and Efficiency*, Management Science (Dec. 1999) ("*Bundling Information Goods*"); Yannis Bakos & Erik Brynjolfsson, *Bundling and Competition On The Internet*, Marketing Science (Jan. 2000).

Bundling very large numbers of unrelated information goods can be quite profitable. The reason is that economies of scale make it much easier to predict consumers' valuations for a bundle of goods than their valuations for the individual goods when sold separately. A "predictive value of bundling" makes it possible to achieve greater sales, greater economic efficiency and greater profits per good from a bundle of information goods than can be attained when the same goods are sold separately. *See Bundling Information Goods* at 2-3.

Moreover, circuit courts since *Jefferson Parish* was decided have likewise held or suggested that the mere ownership of a patent, *viz.*, a "legal monopoly," does not equate to market power sufficient to support a per se rule against tie-ins involving patents. *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 676-77 & n.3 (6th Cir. 1986) ("*Loew's* [was] overbroad and . . . we reject any absolute presumption of market power for copyright or patented product . . . . [S]uch a presumption is not warranted merely by existence of a copyright or patent."); *USM Corp. v. SPS Techs., Inc.*, 694 F.2d 505 (7th Cir. 1982) (suggesting *in dicta* that proof of

market power may be required in patent and copyright tie-ins); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665 (7th Cir. 1985).

D. The Market Power Presumption Facilitates The Assertion Of Baseless Antitrust Counterclaims By Infringers

The cost of defending baseless antitrust claims deters patent owners from properly enforcing their patents against infringers. A clear harmful effect in the practical application of the presumption is that it facilitates patent infringement defendants to bring Sherman Act counterclaims against patentees. The presumption shifts the burden onto the patentee to rebut a presumed market power element and raises the potential that meritless or weak antitrust claims will survive motions to dismiss and summary judgment. The presumption increases the risk to the public that a potentially invalid patent will not be judicially examined or patent claim terms not be construed, as the risk of incurring statutorily mandated treble damages for Sherman Act liability forces settlement of the underlying patent action and antitrust counterclaims to avoid the expense, and treble damages risk, of an extended antitrust trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 593 (1986) (citation omitted) (The "effect" of implausible inferences to require a jury trial "is often to deter procompetitive conduct.").

E. The Department Of Justice And Federal Trade Commission Do Not Apply A Presumption Of Market Power When Evaluating A Tying Case Involving A Patent On The Tying Product

Compelling support for IPO's argument that it is time to eliminate the market power presumption is provided by the policies promulgated by the two agencies of the executive branch empowered with enforcing the federal antitrust laws,

viz., the Department of Justice and Federal Trade Commission ("the Agencies"). The Agencies have squarely rejected the notion that merely having a patent on the tying product somehow confers a *prima facie* presumption of market power.[9] Instead, the Agencies have elected to closely follow the guidance provided by Justice O'Connor's concurrence in *Jefferson Parish*, and require an antitrust plaintiff *to prove* market power. The Guidelines expressly state they are based on three underlying principles: "(a) for the purpose of antitrust analysis, the Agencies regard intellectual property as being essentially comparable to any other form of property; (b) *the Agencies do not presume that intellectual property creates market power in the antitrust context*; and (c) the Agencies recognize that intellectual property licensing allows firms to combine complementary factors of production and is generally procompetitive." U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* § 2 (1995).[10] (emphasis added).

The Court should carefully weigh that both federal agencies have repeatedly made clear that patent tying arrangements frequently result in significant enhancement of efficiencies and pro-competitive benefits.[11] The fact that

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[9] U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* § 5.3 (1995) (the "Guidelines").

[10] The pro-competitive effects of patenting were also recently discussed by the Agencies after a series of public hearings set forth in the recent Report by the Federal Trade Commission "To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy" Chap. 6 (Oct. 2003).

[11] The Agencies' joint policy is that they "[w]ill not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner." Guidelines § 5.3; R. Hewitt Pate, Acting Assistant Attorney General, *Antitrust and Intellectual Property*, Address before the American Intellectual Property Law Association. (Jan. 24, 2003), *available at* http://www.doj.gov/atr/public/speeches/200701.pdf ("Because patents do not necessarily confer market power, there is no presumption that tying

agencies decline as part of their prosecutorial discretion to "presume" market power when evaluating a patent tying case lends strong support that it is the appropriate time to overturn the market power presumption originating under the *International Salt* doctrine, decided in the economic climate that followed in on the heels of the Great Depression and the Second World War in the first half of the last century, and in which patent rights were viewed through a distorted lens.[12]

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arrangements involving patented products necessarily are illegal.") (citing Guidelines § 5.3); Makan Delrahim, Deputy Assistant Attorney General, *Contemporary Issues at the Intersection of Intellectual Property and Antitrust*, Remarks made before the Fair Competition & Market Economy 2004 Shanghai International Forum, Shanghai, China, (Nov. 10, 2004), *available at* http://www.doj.gov/atr/public/speeches/206607.pdf (the DOJ recognizes that "[c]lose substitutes in the marketplace may foreclose the [patented product] from realizing any meaningful return.") (citing Guidelines §§ 2.1-2.2).

[12] Indeed, the general attitude towards patents during late 1940s when *International Salt* was decided may be fairly characterized as antagonistic, glimpsed where Mr. Justice Jackson (in dissent) spoke of the "strong passion in this Court for striking them [patents] down so that the only patent that is valid is one which this Court has not been able to get its hands on." *Jungersen v. Ostby & Barton Co.*, 335 U.S. 560, 572 (1949). Note that the Court had the same complement of Justices when it decided *Jungersen* as it did when it decided *International Salt* several years earlier.

CONCLUSION

The precedent under *International Salt* and *Lowe's* providing for a presumption of market power in a Sherman Act Section 1 patent tying case should be overturned.

Respectfully submitted,

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